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Supreme Court of the United States

October Term, 1975

NO. 75-505

PNEUMATIC SERVICE & EQUIPMENT COMPANY
INSURANCE COMPANY OF NORTH AMERICA
TEXSTEAM CORPORATION
THERM-O-DISC, INC.
E. L. WIEGAND COMPANY
MOVIBLE OFFSHORE, INC.
PACIFIC INDEMNITY COMPANY
TELEDYNE MOVIBLE OFFSHORE
TELEDYNE, INC.
AVONDALE SHIPYARDS, INC.
and SHELL OIL COMPANY,
Petitioners

versus

RAYMOND D. LOUVIERE and
MRS. RAYMOND D. LOUVIERE,
Respondents

PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

DONALD A. HOFFMAN
SCHUMACHER, McGLINCHEY, STAFFORD, MINTZ & HOFFMAN
4330 One Shell Square
New Orleans, Louisiana
ATTORNEYS FOR PNEUMATIC SERVICE & EQUIPMENT COMPANY and INSURANCE COMPANY OF NORTH AMERICA

W. EUGENE DAVIS
CAFFERY, DUHE & DAVIS
P. O. Box 789
New Iberia, Louisiana
ATTORNEYS FOR TEXSTEAM CORPORATION

FRANCIS G. WELLER
DEUTSCH, KERRIGAN & STILES
4700 One Shell Square
New Orleans, Louisiana
ATTORNEYS FOR THERM-O-DISC, INC. and E. L. WIEGAND COMPANY

W. K. CHRISTOVICH
CHRISTOVICH & KEARNEY
1815 American Bank Building
New Orleans, Louisiana
ATTORNEYS FOR MOVIBLE OFFSHORE, INC. PACIFIC INDEMNITY CO., TELEDYNE MOVIBLE OFFSHORE and TELEDYNE, INC.

FELICIEN P. LOZES
DRURY, LOZES & CURRY
850 Bank of New Orleans Bldg.
New Orleans, Louisiana
ATTORNEYS FOR AVONDALE SHIPARDS, INC.

FRANK ALLEN
JONES, WALKER, WAECHTER, POITEVENT, CARRERE & DENEGRE
225 Baronne Street
New Orleans, Louisiana
ATTORNEYS FOR SHELL OIL COMPANY

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Respondents

**PETITION FOR CERTIORARI
TO THE COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Petitioners seek certiorari to review the judgment of the Court of Appeals for the Fifth Circuit in this case, and in support of their petition show:

OPINIONS BELOW AND JURISDICTION

The District Court granted petitioners' motion to dismiss respondents' complaint. The Court's opinion in the form of a minute entry is appended hereto. The Court of Appeals for the Fifth Circuit reversed the judgment of the District Court and remanded the case for further proceedings. The Court of Appeals' opinion, reported at 509 F.2d 278, appended hereto.

The date of the judgment of the Court of Appeals was March 6, 1975. The date of the denial of the motion for rehearing *en banc* was July 3, 1975. Jurisdiction of this Court lies under 28 USC §1254(1).

QUESTIONS PRESENTED FOR REVIEW

I.

Whether the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 USC §933(b), provides the exclusive remedy for an employer and its insurer to recoup compensation payments from a third-party tort feasor.

II.

Whether there is a gap in the compensation scheme provided in the LHWCA which requires the court to apply Louisiana law to allow the employer/insurer an additional "non-statutory" remedy against a third-party tort feasor.

STATUTES INVOLVED

Outer Continental Shelf Lands Act

43 USC 1332(a):

"It is declared to be the policy of the United States the subsoil and seabed of outer Continental Shelf appertain to the United States and power of disposition as provided in this subchapter."

43 USC 1333(a)(1):

"The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing, and transporting resources therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State. . ."

43 USC 1333(a)(2):

"To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State as of August 7, 1953 are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each. . ."

43 USC 1333(b):

"The United States district courts shall have original jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources of the subsoil and seabed of the outer Continental Shelf, and proceedings with respect to any such case or controversy may be instituted in the judicial district of the adjacent State nearest the place where the cause of action arose."

43 USC 1333(c):

"With respect to disability or death of an employee resulting from any injury occurring as a result of operations described in subsection (b) of this section, compensation shall be payable under the provisions of the Longshoremen's and Harbor Worker's Compensation Act. . ."

Longshoremen's and Harbor Worker's Compensation Act

33 USC 905(b):

"(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was

employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."

33 USC 919(a):

"Subject to the provisions of section 913 of this title a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the Secretary at any time after the first seven days of disability following any injury or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim."

33 USC 919(b):

"Within ten days after such claim is filed the deputy commissioner, in accordance with regulations prescribed by the Secretary, shall notify the employer and any other person (other than the claimant), whom the deputy commissioner considers an interested party, that a claim has been filed. Such notice may be served personally upon the employer or other person, or sent to such employer or person by registered mail."

33 USC 919(c):

"The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon ap-

plication of any interested party shall order a hearing thereon. If a hearing on such claim is ordered the deputy commissioner shall give the claimant and other interested parties at least ten days' notice of such hearing, served personally upon the claimant and other interested parties or sent to such claimant and other interested parties by registered mail or by certified mail, and shall within twenty days after such hearing is had, by order, reject the claim or make an award in respect of the claim. If no hearing is ordered within twenty days after notice is given as provided in subdivision (b) of this section, the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim."

33 USC 933(a):

"If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person."

33 USC 933(b):

"Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award."

STATEMENT OF THE CASE

Respondent, Raymond D. Louviere, an employee of Movible Offshore, Inc., was injured on May 6, 1970, when a hot water heater exploded in the living quarters of a fixed platform in the Gulf of Mexico located offshore from the State of Louisiana. Following the casualty, Movible's insurer, Argonaut Insurance Company, made compensation payments to several injured employees, including Louviere, pursuant to its responsibilities under the Longshoremen's and Harbor Workers' Compensation Act, 33 USC §901, *et seq.*

Neither Movible nor Argonaut ever requested a formal award in a compensation order filed by the Deputy Commissioner, nor did the Deputy Commissioner take the initiative to make an award under the procedure provided in 33 USC §919(c).

On May 5, 1971, Argonaut filed a Complaint alleging that "pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, *specifically, 33 USC* 933, it is entitled to full recovery of whatever sums it has paid or may become obligated to pay in the future against those parties who may be found to have been responsible for the aforesaid explosion." (Emphasis supplied). Argonaut's prayer asked for Judgment for "whatever sums it has or may become obligated to pay *under the provisions of the Longshoremen's and Harbor Workers' Compensation Act.*" (Emphasis supplied). Nowhere in Argonaut's Complaint did it assert a cause of action for any "non-statutory" remedies under Louisiana or any other law.

In accordance with the decisions of the United States Supreme Court in *Rodrigue vs. Aetna Casualty & Surety Company*, 395 U.S. 352, 23 L.Ed.2d 360 (1969); and

Chevron Oil Company vs. Huson, 404 U.S. 97, 30 L.Ed.2d 296 (1971), the Louisiana one-year prescriptive period for tort actions applies to the right of Raymond D. Louviere to commence an action against third-party tort feasors. Article 3534, Louisiana Civil Code of 1870.

Louviere did not file suit within one year following the accident and, in fact, took no action until February 27, 1973, when he finally got around to asserting a claim against the third persons allegedly to blame for this casualty. Petitioners immediately filed a motion to dismiss Louviere's suit as being time-barred. Relying on the precedents set by the United States Court of Appeals for the Second Circuit in *Liberty Mutual Insurance Company vs. United States*, 290 F.2d 257 (2d Cir. 1961); and for the District of Columbia Circuit in *Joyner v. F. & B. Enterprises, Inc.* 448 F.2d 1185 (D. C. Cir. 1971), the District Court granted petitioners' motion and dismissed Louviere's suit.

However, on appeal, the United States Court of Appeals for the Fifth Circuit refused to follow *Liberty Mutual, supra*, and *Joyner, supra*, and reversed the district court, holding that Argonaut had a "non-statutory" remedy against the tort feasors under Louisiana law and that the filing of its suit served to interrupt prescription as to Louviere's action against third persons.

According to the Fifth Circuit, the failure of Movible/Argonaut to obtain a formal award pursuant to 33 USC §933(b) was irrelevant. Since the statute did not specifically state that this remedy was "exclusive", the Courts could give the employer and its insurer an additional remedy wholly outside the framework of the Longshoremen's and Harbor Workers' Compensation Act, through filling a "gap" in the law and by applying Louisiana's theory of unjust enrichment.

REASONS FOR GRANTING THE WRIT

I.

The language of the statute and its legislative history demonstrate the intent of Congress to retain control of the action against third parties in the hands of the employee

The result of the Fifth Circuit decision in *Louviere* allows an employer an automatic assignment of the employee's rights to sue third-party tort feasors immediately upon acceptance by the employee of voluntary payments. The court reaches this result by providing the employer a "non-statutory" remedy under Louisiana law, implying that this right is a new concept not considered by Congress when it enacted the Longshoremen's and Harbor Workers' Compensation Act. However, an examination of the act as adopted in 1927 indicated that it contained this automatic assignment. Later Congress amended the act to remove it. The original language of 33 USC 933(b) provided:

> "Acceptance of such compensation shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person, whether or not the person entitled to compensation has notified the Deputy Commissioner of his election."

If the original statutory language had been retained, the Fifth Circuit's conclusion in *Louviere* would be correct. But in 1938 Congress amended the act to require acceptance of such compensation "under an award in a compensation order filed by the Deputy Commissioner" as a prerequisite to the assignment to the employer. As the court pointed out in *Iara vs. Silver Line*, 56 F.Supp.

42 (SDNY 1943), and *Cupo vs. Isthmian S.S. Co.*, 56 F.Supp. 45 (SDNY 1971), by rephrasing the subdivision, Congress provided that the rights of an employee were *not* automatically assigned to the employer by the mere acceptance of compensation. "Such an assignment takes place only if the compensation is accepted by the employee, after the entry of an order by a Deputy Commissioner fixing the employee's award" *Cupo*, supra, p. 47.

Thus, Congress, in the light of eleven years experience with the automatic assignment provison, amended the statute and substituted the requirement of a formal award by the Deputy Commissioner.

In 1959 Congress again took action with respect to this section of the Longshoremen's and Harbor Workers' Compensation Act when it eliminated the election of remedies by the employee and amended Subsection (a) of 33 USC §933 to allow an employee to both accept compensation and also pursue a cause of action against third-party tort feasors. Once again, Congress had the opportunity to scrutinize the operation of this statute. Had it desired, Congress could have reverted to the former language and given the employer an automatic assignment following acceptance by the employee of voluntary payments.

However, Congress did not do so. In fact, it not only retained the requirement of a formal award, but tacked on a six-month waiting period following the election of the award before the employer was assigned the right to recover compensation from third parties.

Throughout the history of the act, Congress showed a consistent purpose to require that the employee take

the initiative in seeking compensation payments and in pursuing a cause of action against potential third-party tort feasors.

From 1927 until 1959 the employee was required to elect between these two remedies. Although the election requirement was abolished in 1959, Congress still retained for the employee the right of control in the initiation of an action against a third-party tort feasor. The obvious implication is that Congress is loath to allow an employee to sit on his hands and expect his employer (or its insurer) to protect his rights.

Although no precise statute of limitations for the assertion of an employee's rights against third-party tort feasors is contained in the statute, we submit that Congress would not be shocked by the imposition of the Louisiana one-year prescriptive period. We point out that 33 USC §912(a) contains a one-year time limitation for the filing of a claim for disability under the act.

In sum, we submit that the Fifth Circuit erred in going beyond the statute where its language was clear and unambiguous. In our opinion, the District Court, in following the decisions of the Fourth Circuit and the District of Columbia Circuit, was correct in concluding that Argonaut had no right of action against third-party tort feasors with respect to Raymond D. Louviere, and that the failure of Louviere to file suit within one year from the date of his accident required a dismissal of his Complaint against third-party tort feasors.

II.

The Fifth Circuit erred in relying on *Federal Marine Terminals v. Burnside*, 394 U.S. 404, 22 L.Ed.2d 371 (1969).

The *Burnside* Case is distinguishable from the case at bar on several important grounds: First, in *Burnside*, the employee's beneficiaries initiated an action against a third-party tort feasor by filing a lawsuit in the Federal District Court on a timely basis. Here, Louviere initiated a suit beyond the one-year prescriptive period established by Louisiana law.

Second, in *Burnside* a normal intervention would not have allowed the employer to recover the full amount of the compensation payments paid to the employee.

In the unique circumstances of the *Burnside* Case, the fund available for the plaintiff would have been insufficient to give the employer full recovery of his compensation payments. Under Illinois law in the wrongful death action, the plaintiff was limited to a recovery of $30,000.00, and Burnside's compensation payments had exceeded that figure.

Thus, in allowing the employer to file a counterclaim against the shipowner for reimbursement of compensation payments, the court in *Burnside* was doing nothing more than providing an effective remedy for the employer where an "intervention" would have precluded the employer from recovering the full amount of the payments already made.

Third, the *Burnside* Case was relevant in the pre-1972 amendment era. In allowing Burnside to counterclaim, the court pointed out that its theory of recovery was not as "statutory assignee," but that Burnside had a separate cause of action against the shipowner for failing to provide the stevedore with a safe place to work. This theory made eminent good sense in the longshoreman/shipowner/

stevedore cases which typically arose prior to adoption of the 1972 amendments to the LHWCA, but has no application to the state of the law today.

In the case at bar, there is no vessel involved and Argonaut sued strictly as a "statutory assignee." In Paragraph 8 of its Complaint, Argonaut alleges:

> "Complainant avers that pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, specifically 33 USCA 933, it is entitled to full recovery of whatever sums it has paid or may become obligated to pay in the future against those parties who may be found to have been responsible for the aforesaid explosion."

In addition, the Prayer of the Complaint states as follows:

> "WHEREFORE, Argonaut Insurance Company prays that there be judgment in its favor and against the defendants herein named, in solido, for whatever sums it has or may become obligated to pay under the provisions of the Longshoremen's and Harbor Workers' Compensation Act as a result of the described casualty, together with interest, costs and reasonable attorney's fees."

Thus, Argonaut did not assert its own separate cause of action, but sought only to obtain recoupment of compensation pursuant to the statute. Having failed to fulfill the statutory requirements of an award and the six-month waiting period, Argonaut's suit had no validity with respect to Raymond D. Louviere.

III.

The Fifth Circuit erred in concluding that there was a gap in the LHWCA requiring the application of Louisiana law.

As the Fifth Circuit recently recognized in *Nations v. Morris*, 483 F.2d 577 (5th Cir. 1973), the LHWCA is "a complete body of law, a legislative island unto itself." As mentioned earlier, Congress contemplated all possibilities regarding the assignment of an employee for recoupment of compensation payments when it drafted the LHWCA. Gradually, through amendment, it restricted the assignment and set forth the requirements contained today in 33 USC §933(b).

As the United States Supreme Court pointed out in *Rodrigue, supra*, and *Huson, supra*, the Outer Continental Shelf Lands Act allows the application of state law only where there is a gap in Federal law. It was inappropriate for the court to apply the Louisiana law of unjust enrichment, subrogation, and interruption of prescription because no gap existed in the Federal law.

The Fifth Circuit erred when it impliedly suggested that Movible (or Argonaut) had to contest Louviere's claim for compensation in order to become eligible for compensation award and thus to obtain assignment of Louviere's claim.

It is clear from the statute that the Deputy Commissioner can issue an award in an uncontested situation. 33 USC §919(c) provides:

> "If no hearing is ordered within 20 days after notice is given as provided in subdivision (b) of this section, the Deputy Commissioner shall, by

> order, reject the claim or *make an award in respect of the claim.*" (Emphasis supplied).

See *Czaplicki v. The Hoegh Silvercloud*, 351 US 525, 100 L.Ed. 1387 (1956) and *Grasso v. Lorentzen*, 149 F.2d 127 (2nd Cir. 1945), cert.den. 326 U.S. 743, reh.den. 328 U.S. 870

In the instant case it would have been an easy matter for Movible (or Argonaut) to obtain a compensation order simply by requesting it 20 days after receipt of notice. By following this procedural device, the employer would have protected its right to pursue its statutory assignment against third parties. Having to take that step, Argonut lost its right to obtain a recoupment from third parties for the payments made to Louviere.

CONCLUSION

Petitioners respectfully submit that in the interest of uniformity in the application of the Longshoremen's and Harbor Workers' Compensation Act to accidents on fixed platforms and to resolve the inter-Circuit conflict at issue, this Court should grant certiorari.

DONALD A. HOFFMAN
SCHUMACHER, McGLINCHEY, STAFFORD, MINTZ & HOFFMAN
4330 One Shell Square
New Orleans, Louisiana
ATTORNEYS FOR PNEUMATIC SERVICE & EQUIPMENT COMPANY and INSURANCE COMPANY OF NORTH AMERICA

W. EUGENE DAVIS
CAFFERY, DUHE & DAVIS
P. O. Box 789
New Iberia, Louisiana
ATTORNEYS FOR TEXSTEAM
CORPORATION

FRANCIS G. WELLER
DEUTSCH, KERRIGAN & STILES
4700 One Shell Square
New Orleans, Louisiana
ATTORNEYS FOR THERM-O-
DISC, INC. and E. L.
WIEGAND COMPANY

W. K. CHRISTOVICH
CHRISTOVICH & KEARNEY
1815 American Bank Building
New Orleans, Louisiana
ATTORNEYS FOR MOVIBLE
OFFSHORE, INC.
PACIFIC INDEMNITY CO.,
TELEDYNE MOVIBLE
OFFSHORE and TELEDYNE,
INC.

FELICIEN P. LOZES
DRURY, LOZES & CURRY
850 Bank of New Orleans Bldg.
New Orleans, Louisiana
ATTORNEYS FOR AVONDALE
SHIPYARDS, INC.

FRANK ALLEN
JONES, WALKER, WAECHTER, POITEVENT, CARRERE & DENEGRE
225 Baronne Street
New Orleans, Louisiana
ATTORNEYS FOR SHELL OIL COMPANY

CERTIFICATE

I certify that a copy of the foregoing Memorandum has been forwarded to all counsel of record herein by placing same in the U. S. Mail, postage prepaid and properly addressed, this_____day of_____, 1975

DONALD A. HOFFMAN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Minute Entry
September 25, 1973
GORDON, J.

CIVIL ACTION
NO. 72-534
SECTION "I"

RAYMOND D. LOUVIERE, ET AL
vs.
SHELL OIL COMPANY, ET AL

Defendants, American Marine Corporation (previously Alexander Shipyards, Inc.); Texsteam Corp.; Avondale Shipyards, Inc.; Insurance Company of North America; Therm-O-Disc, Inc.; E. L. Wiegand Company; Pneumatic Service and Equipment, Inc.; Pacific Indemnity Company; Teledyne Movible Offshore; Movible Offshore, Inc.; Teledyne, Inc.; Shell Oil Company; Travelers Insurance Company and Superior Oil Company have filed motions to dismiss, in accordance with Rule 12(b) of the Federal Rules of Civil Procedure, the complaint of Raymond Louviere, or alternatively, motions for summary judgment pursuant to Rule 56. Movers predicate their respective motions on one principle fact: plaintiff Louviere's cause of action has prescrbed.

On September 5, 1973, the Court entertained oral argument on the respective motions to dismiss. After completion of the oral argument of counsel, the Court granted said motions to dismiss, and concurrently, the Court orally

stated its reasons for ruling, and indicated to the parties that supplemental written reasons would be issued at a later date. Accordingly, the Court will supplement its rationale presented in court with the following:

The parties agree that the Outer Continental Shelf Lands Act makes Louisiana law applicable since the accident giving rise to Louviere's alleged cause of action occurred on a fixed platform located in the Gulf of Mexico more than one marine league from the Louisiana coast. *Chevron v. Huson*, 92 S.Ct. 349, 404 U.S. 97, 30 L.Ed.2d 296 (1971); *Rodrigue v. Aetna*, 89 S.Ct. 1834, 395 U.S. 353 (1969). The Louisiana prescriptive period for tort actions such as the one at bar is one year. Louisiana Civil Code, Article 3534. It is further undisputed by the parties that plaintiff Louviere filed this action more than one year after the accident.

In an attempt to avoid the effects of the Louisiana one year prescriptive period, Louviere contends that prescription as to his action was interrupted when Argonaut Insurance Company filed its suit [*Argonaut Ins. Co. v. Shell Oil Co.*, Civil Action No. 71-1265 (E.D.La.)] seeking reimbursement for the benefits paid to Louviere under the Longshoremen and Harbor Workers Act (LHWA) within the one year time period following the date of the accident. Thus, Louviere argues that he should not be barred by the statute of limitations in the present litigation.

Defendants argue that Argonaut's suit could not have interrupted the running of prescription since it had no right of action to institute a suit for the reimbursement of funds paid by Argonaut under the Longshoremen's and Harbor Workers Act. In support of their position, de-

fendants point out that Argonaut did not pay Louviere LHWA benefits as a result of a formal award by the Commissioner; rather, the benefits were paid informally. Movers hasten to add that pursuant to Section 933 of Title 33 United States Code, the Longshoremen's and Harbor Workers Act, an employer or the employer's insurer only has right of action against a third party who could have caused employee's injuries when two conditions are satisfied, to wit: (1) a formal award has been rendered by the Deputy Commissioner, and, (2) six months have elapsed since the rendition of the award.

Movers argue that the cases interpreting Section 933 make it clear that the injured employee has the exclusive right to institute suit against a third party tortfeasor until six months have elapsed following the rendition of an award by the Deputy Commissioner. While movers agree that the employer or insurer may intervene in a third party action filed by an injured employee at any stage, they contend that neither the employer nor the insurer may institute an action against a third party unless and until the aforementioned two conditions are met.

In support of their proposition, movers cite *Liberty Mutual Insurance Co. v. United States*, 290 F.2d 257 (2nd Cir. 1961 and *Joyner v. F. & B. Enterprises, Inc.*, 448 F.2d 1185 (D.C. Cir. 1971). In *Liberty Mutual Insurance Co.*, the Second Circuit did not allow a compensation insurer to file suit for benefits paid under a formal award where the statutory six month period had not yet expired. The insurer needed to file its suit prior to the running of the six month period because the action in that case had prescribed after the expiraton of the statutory six month period. The Court, nevertheless, held

that the insurer did not have a right of action for reimbursement until the six months had elapsed.

In the case of *Joyner v. F. & B. Enterprises, Inc., supra,* the Court concluded that the employer or the employer's compensation insurer does not retain a substantive right of action against the third party when compensation benefits are made without a formal award and the employee elects to commence an action against a third party.

The facts in the present case resemble a combination of the factual circumstances in *Liberty Mutual* and *Joyner.* Benefits were paid to Louviere absent a formal award, and subsequently, the compensation insurer instituted suit. The key question thus becomes: does the employer or its insurer have a substantive right of action against third parties. Defendants propose that there is no such right in light of the reasoning stated in *Liberty Mutual.*

The Court must conclude, therefore, that inasmuch as Argonaut Insurance Co. did not pay Louviere pursuant to a compensation award by the Deputy Commissioner, there could not have been a statutory assignment of the plaintiff's claim against third parties to Argonaut Insurance Co. Therefore, Argonaut is unable to pursue as an assignee an independent right of action against third parties to recover sums paid to Louviere, and any suit which it might have filed in connection with a misconception of its rights could not have had the effect of interrupting prescription in favor of plaintiff.

The basic philosophy suggested by 33 U.S.C. §933 indicates that the courts will allow the employer or its insurer a setoff, by means of subrogation, to the extent

of compensation paid to avoid double recovery. This approach to recovery requires that the employee sue third parties in accordance with the state statute of limitations, and, then, the compensation insurer be permitted to intervene for its claim in the employee's suit.

Failure of Argonaut to make payment without a formal award to Louviere requires that Argonaut forego its possible right of control over the employee's (Louviere's) right of action against third parties. Nevertheless, Argonaut's right to reimbursement out of any recovery that Louviere might obtain against third parties remains unaffected. *Cf. Ruggiero v. Rederiet for M[S Marion*, 308 F.Supp. 789 (S.D.N.Y).

Plaintiff suggests to the Court that the decision of *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 89 S.Ct. 1144, 394 U.S. 404 (1969), permits this suit by Louviere upon recognition of Argonaut's independent right of action against third parties, regardless of Argonaut's compliance or lack thereof with the LHWA provisions. In *Burnside*, a longshoreman was fatally injured in the performance of his duties aboard ship, and the decedent's representative instituted suit against Burnside, the owner of the vessel. Burnside, in turn, filed a third party action against the decedent's employer, Federal Marine Terminals, Inc. to obtain indemnity under the *Ryan* doctrine. *Ryan Stevedoring Company v. Pan-Atlantic Steamship Corporation*, 350 U.S. 124, 76 S.Ct. 232 (1956). Federal Marine Terminals, Inc., the stevedore, asserted a counterclaim against Burnside, the vessel owner, attempting to recover amounts expended and to be expended in the payment of benefits to the survivor under the Longshoremen and Harbor Workers Act. The stevedore's counterclaim was activated by the fact that the sur-

vivors' claim against the ship was limited by state law to a maximum amount of $35,000. The stevedore's exposure, therefore, was substantially greater than the statutory limit that attached to the survivors' possible recovery. Reversing the District Court and the Court of Appeals, the Supreme Court in *Burnside* held that the right to sue as a subrogee pursuant to the LHWA was not the exclusive remedy of the stevedore, but, that the stevedore was entitled to assert an independent cause of action against the vessel owner for the latter's negligence.

The *Burnside* case is plainly distinguishable from the case sub judice both factually and legally. From a factual standpoint, the complaint filed by Argonaut in Civil Action No. 71-1265, *Argonaut Insurance Co. vs. Shell Oil Company*, (E.D. La.) alleges no direct action in tort against any of the defendants. Rather, Argonaut has limited its demand to that of seeking recovery through subrogation through the LHWA.

With respect to the legal distinction between these two cases, the Court concludes, in light of the factual situation, that Argonaut, even if it had desired, could not have pursued an independent right of action against third parties, since no independent right of action exists. *Burnside* does not constitute legal authority for application of the doctrine allowing an independent right of action beyond cases which involve the triad of stevedore-longshoreman-vessel owner. *See generally, Liberty Mutual Insurance Co. v. Fruehauf Corp.*, 472 F.2d 69 (6th Cir. 1972). It also should be noted that the courts have been reluctant to extend the recognition of the special legal relationship of *Ryan* on the theory of implied warranty of workmanlike services beyond this tripartite relationship. *Cf. Ocean Drilling & Exploration Company v. Berry*

Bros. Oilfield Service, 377 F.2d 511 (5th Cir.), cert. denied, 389 U.S. 849, 88 S.Ct. 102 (1967).

In summary, the Court concludes that the holding of *Liberty Mutual Insurance Co. vs. United States, supra*, controls the present case, thereby reducing plaintiff's claim against third parties to one that is barred by prescription, since the institution of Argonaut's suit of reimbursement of benefits paid under the LHWA can have no effect on the interruption of prescription for Louviere.

Accordingly,IT IS ORDERED that the motions to dismiss by defendants, American Marine Corporation (previously Alexander Shipyards, Inc.); Texsteam Corp.; Avondale Shipyards, Inc.; Insurance Company of North America; Therm-O-Disc, Inc.; E. L. Wiegand Company; Pneumatic Service and Equipment, Inc.; Pacific Indemity Company; Teledyne Movible Offshore; Movible Offshore, Inc.; Teledyne, Inc.; Shell Oil Company; Travelers Insurance Company and Superior Oil Company, are hereby GRANTED.

JACK GORDON
Judge, United States District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

RAYMOND D. LOUVIERE ET AL
versus
SHELL OIL COMPANY ET AL

CIVIL ACTION NO. 73-534
SECTION "I"

FINAL JUDGMENT UNDER RULE 54-B

The motions of defendants, American Marine Corporation (previously Alexander Shipyards, Inc.), Texsteam Corporation, Avondale Shipyards, Inc., Insurance Company of North America, Therm-O-Disc, Inc., E. L. Wiegand Company, Pneumatic Service & Equipment, Inc., Pacific Indemnity Company, Teledyne Movible Offshore, Movible Offshore, Inc., Teledyne, Inc., Shell Oil Company, The Travelers Insurance Company and Superior Oil Company, to dismiss and/or for summary judgment having come on for hearing and the court having considered the pleadings, exhibits, briefs and argument of counsel finds that the law and evidence are in favor of movers and for the written reasons assigned and entered on September 26, 1973:

IT IS ORDERED, ADJUDGED AND DECREED that the motions filed by movers enumerated above be and they are hereby granted.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the petition herein filed against movers, American Marine Corporation (previously Alexander Shipyards, Inc.), Texsteam Corporation, Avondale Shipyards, Inc., Insurance Company of North America, Therm-O-Disc, Inc., E. L. Wiegand Company, Pneumatic Service & Equipment, Inc., Pacific Indemnity Company, Teledyne Movible Offshore, Movible Offshore, Inc., Teledyne, Inc., Shell Oil Company, The Travelers Insurance Company and Superior Oil Company, be and it is hereby dismissed with prejudice.

WHEREAS, there is no just reason for delay in rendering final judgment as to movers enumerated above:

IT IS ORDERED, ADJUDGED AND DECREED that pursuant to Rule 54-B, F.R.C.P., that this judgment be and it is hereby deemed a final judgment in this action as to movers, American Marine Corporation (previously Alexander Shipyards, Inc.), Texsteam Corporation, Avondale Shipyards, Inc., Insurance Company of North America, Therm-O-Disc, Inc., E. L. Wiegand Company, Pneumatic Service & Equipment, Inc., Pacific Indemnity Company, Teledyne Movible Offshore, Movible Offshore, Inc., Teledyne, Inc., Shell Oil Company, The Travelers Insurance Company and Superior Oil Company.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that these proceedings be and they are hereby stayed as against all defendants except movers until delays for all appeals have expired or, if appeals are taken, until final resolution by appellate courts.

New Orleans, Louisiana, this 12th day of October 1973.

JACK GORDON
Judge, United States District Court

United States Court of Appeals,

Fifth Circuit.

No. 73-3686.

March 6, 1975.

Raymond D. LOUVIERE et al, Plaintiffs-Appellants,

v.

SHELL OIL COMPANY et al, Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before WISDOM and BELL, Circuit Judges, and BREWSTER, District Judge.

WISDOM, Circuit Judge.

Raymond Louviere was injured when a hot water heater exploded in the living quarters of a fixed platform in the Gulf of Mexico. Almost three years after the explosion, he filed suit for damages. The district court dismissed his suit, holding that his claim had prescribed. Louviere appeals, alleging that suit filed by his employer's workmen's compensation carrier against the same defendants interrupted the running of prescription. We reverse and remand.

Louviere was employed by Movible Offshore, Inc. as a cook in the living quarters of a fixed platform located on the outer Continental Shelf off the Louisiana coast. On May 6, 1970, a hot water heater exploded injuring

some workers and killing others. Louviere suffered broken ribs, a broken collar bone, an injured back, and burns. After surgery on his back, he returned to work from time to time but on each occasion found himself unable to continue working. A psychiatrist concluded that the explosion had caused multiple trauma, and that Louviere later suffered an anxiety neurosis and depression. He has, allegedly, had severe pain from his injuries and has had episodic crying spells. He now asserts that he is totally and permanently disabled.

After the accident, Movible Offshore's compensation carrier, Argonaut Insurance Company, paid Louviere benefits under the terms of the Longshoremen's and Harbor Workers' Compensation Act. 33 U.S.C. § 901 et seq. Because Movible Offshore did not contest Louviere's right to compensation, benefits were paid without entry of an award by the deputy commissioner. Argonaut, as Movible's subrogee,[1] then filed a suit in federal district court on May 5, 1971, seeking reimbursement for workmen's compensation benefits paid as a result of the explosion. The complaint named as defendants, the owner of the platform, the manufacturers and sellers of the heater and some of its components, and the builder of the living quarters.

The complaint alleged that the negligence of the defendants was the proximate cause of the explosion; that certain employees were injured or killed in the explosion; that, as a result of the explosion, Argonaut had become obligated to pay workmen's compensation benefits to those employees under the Longshoremen's and Harbor Workers'

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[1]An insurer paying workmen's compensation benefits under the Act, is subrogated to the employer's interests to the extent of benefits paid. 33 U.S.C. § 933(h). *Cf.* Hartford Accident & Indemnity Co. v. Byles, La.App.1973, 280 So.2d 624.

Compensation Act; and that, under the provisions of the Act, it was entitled to recover against the defendants all the benefits it had paid or might become obligated to pay.

On February 27, 1973, while Argonaut's suit was pending but before trial,[2] Louviere filed suit, seeking to recover damages from the same defendants, alleging their negligence as the cause of his injuries.[3] The defendants filed a plea of prescription, alleging that the one year prescriptive period allowed under Louisiana law for suit on a tort claim had passed and that Louviere's claim was barred. They argue that Argonaut's suit was not effective to interrupt prescription because it was barred by provisions of the Longshoremen's and Harbor Workers' Compensation Act. 33 U.S.C. § 933.

The Louisiana one year period of limitations governing personal injury actions, Art. 3536. La.Civ.Code Ann., is applicable to this action. *Chevron Oil Co. v. Huson*, 1971, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296.[4] Also governing, in the absence of applicable federal law, is LSA—R.S. 9:5801, providing for interruption of prescription by filing of a suit.[5]

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[2]The district court dismissed Argonaut's independent suit on June 6, 1974. The reason given in the minute entry was that the compensation payments were not made under a formal award.

[3]Argonaut's suit also named Movible Offshore as a defendant. Because an employer's liability under the Act is exclusive of all other liability to the employee, Movible should be dismissed from the suit. 33 U.S.C. § 905.

[4]Jurisdiction of this action is grounded on 43 U.S.C. § 1333, the Outer Continental Shelf Lands Act, which extends coverage of the Longshoremen's and Harbor Workers' Compensation Act to accidents taking place on fixed platforms such as the one involved here. 43 U.S.C. § 1333(c). The law applicable to these structures is the federal law of the United States and the law of the adjacent state applied as federal law in the absence of inconsistent federal law. 43 U.S.C. § 1333(a)(2); Rodrigue v. Aetna Casualty & Surety Co., 1969, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360.

[5]This provision reads:

"The filing of a suit in a court of competent jurisdiction shall interrupt all prescriptions affecting the cause of action therein sued upon, against all defendants, including minors and interdicts." LSA—R.S. 9:5801

The appellees seek to avoid application of this rule in favor of Louviere, by invoking the rule that a suit that "does not state any right or cause of action whatsoever" will not interrupt prescription. *Callendar v. Marks*, Sup.Ct.1936, 185 La. 948, 952, 171 So. 86, 87. They contend that Argonaut's suit falls within this rule, because Section 33 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 933 contemplates that an employer may sue a third party only where he has paid compensation benefits under an award entered by the deputy commissioner. They would thus have us impute to the assignment provision of Section 33 an exclusory effect, preempting any nonstatutory remedies otherwise available to an employer to recoup from a third party tort-feasor compensation benefits paid under the Act. Louviere argues that, although Section 33 makes the right to sue as a statutory assignee contingent on payment of compensation under an award, it was not designed to supplant parallel, nonstatutory remedies to the employer and did not bar Argonaut's suit, as the employee's subrogee.

The threshold questions we must consider are whether Section 33 of the Act preempts whatever nonstatutory rights of action an employer might have for compensation payments to an employee, and if not, whether the employer does, in the absence of a statutory bar, have a right of action in the circumstances this case presents, and whether suit to enforce such a right is effective to interrupt prescription of the employee's claim for damages.

I.

The contention that Section 33 of the Act should be construed as providing the sole remedy of an employer

against third persons, preempting other nonstatutory remedies, was addressed and rejected in *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 1969, 394 U.S. 404, 89 S.Ct. 1144, 22 L.Ed.2d 371. There a longshoreman had been killed by a fall into an unguarded hatch. His widow, after accepting compensation under an award, filed a wrongful death action against the shipowner, Burnside, within six months of the award. Burnside, in turn, filed a separate action in the same federal court seeking indemnification from Marine Terminals, the longshoreman's employer. Marine Terminals, then counterclaimed against Burnside for "all sums which have been paid or will be paid" as compensation benefits, alleging that Burnside, as owner and operator of the vessel, had breached its duty to the stevedore to provide a safe place of work, causing the death which triggered the stevedore's statutory obligation to pay compensation. The district court dismissed the counterclaim and the court of appeals affirmed, both reasonng that the statutory remedy was exclusive and that the employer could not sue except as a statutory assignee.

The Supreme Court reversed. First, it held that Section 33 of the Act is not the exclusive source of an employer's remedies to recoup compensation payments from negligent third parties. The keystone of its analysis was that Section 33 "gave the employer, in return for his absolute liability to the [employee], part of the latter's rights against others" and "the legislative grant of a new right does not ordinarily cut off or preclude other nonstatutory rights in the absence of clear language to that effect." 394 U.S. at 412, 89 S.Ct. at 1149. The Court, looking to the language of the statute and its legislative history, found nothing to suggest a purpose to limit the employer's remedy against third persons to assignment to the rights

of the compensated employee. The Court particularly observed that whereas Congress had explicitly made the employer's absolute liability for compensation exclusive of any tort liability, it attached no such exclusivity to the employer's right to sue third parties as the assignee to the rights of the employee.

Liberty Mutual Insurance Co. v. United States, 2 Cir. 1961, 290 F.2d 257, and *Joyner v. F. & B. Enterprises*, 1971, 145 U.S.App.D.C. 262, 448 F.2d 1185, on which the appellees rely, are,we conclude, inconsistent with *Burnside*. *Liberty Mutual* involved the same longshoreman-stevedore-shipowner triangle that was present in *Burnside*. The stevedore's compensation carrier paid benefits to the employee under an award. When the employee failed to sue, the employer filed suit against a third party, four months after the award, but only eleven days before his suit would have been bared by the governing statute of limitations. Had he waited the statutory period of six months, to file as a statutory assignee, his claim would have been barred. Chief Judge Lumbard, in dissent, argued that although the employer was not entitled to sue as a statutory assignee until six months after the award, he should be permitted to seek recoupment as an equitable subrogee. His line of reasoning, similar to that of the Court in *Burnside*, was that the statutory assignment of rights granted by Section 33 conferred an additional remedy on the employer but did not preempt preexisting nonstatutory remedies. Nevertheless, the majority upheld the dismissal of the employer's suit, finding that, absent statutory assignment, neither the employer nor its subrogated compensation carrier was entitled to initiate an action against an alleged third party tortfeasor.

The Court of Appeals for the District of Columbia

reached the same conclusion in *Joyner v. F. & B. Enterprises*, 1971, 145 U.S.App.D.C. 262, 448 F.2d 1185. There the defendant in a suit filed by the employee attempted to join the employer, who had paid compensation without an award, as a real party in interest under Rule 17 of the Federal Rules of Civil Procedure: The court upheld the denial of joinder, on the ground that an employer who pays compensation without an award lacks a substantive right to sue a third party for reimbursement of benefits paid. In such circumstances, the court concluded, as had the court in *Liberty Mutual*, that the employer's only right was to reimbursement out of his employee's recovery against third parties — a remedy the courts have found implicit in the statutory scheme, although it is not specifically granted by the statute. See *Pope & Talbot, Inc. v. Hawn*, 1953, 346 U.S. 406, 74 S.Ct. 202, 98 LEd. 143; *The Etna*, 3 Cir. 1943, 138 F.2d 37.

Both decisions appear to impute to Section 33 an exclusory effect. To this extent they are, we conclude, inconsistent with the holding and reasoning of *Burnside*. Both appear to have decided that recognition of an independent, nonstatutory right of action would be inimical to the legislative purpose evidenced by the statutory scheme. *Burnside* apart, we find a general poverty of support for that conclusion.

First, courts and commentators have recognized the objective under the Act of "placing the burden ultimately on the company whose default caused the injury." *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, 1964, 376 U.S. 315, 324, 84 S.Ct. 748, 754, 11 L.Ed.2d 732, cited in *Burnside*, 394 U.S. at 420, n. 22, 89 S.Ct. 1144, 22 L.Ed.2d 371. See generally, 2 Larson's

Workmen's Compensation Law §§ 71 and 76 (Cum.Supp. 1974). Similarly, a recognized purpose of the Act is "to protect employers who are subjected to absolute liability by the Act." *Pope & Talbot, Inc. v. Hawn*, 1953, 346 U.S. at 412, 74 S.Ct. at 206.

Section 33, if exclusive, is manifestly incapable of advancing these related objectives. One commentator has identified nine distinct situations where a holding that the Section 33 remedy is exclusive would "deprive the employer of a valuable prior remedy and present the third party with a gratuitous immunity." 2 Larson's Workmen's Compensation Law § 77 at 250.102—.103 (Cum.Supp.1974). As that commentator aptly admonishes, "before a statutory remedy is construed to be an implied abolition of all antecedent remedies, it should be shown that the new remedy covers the ground previously dealt with by the old, without substantial lacunae where nothing is put on the place of the remedy abolished." *Id.* at 250.102. Section 33 does not meet this test.

The statutory scheme is also designed to assure prompt and certain payment of benefits to the injured employee. To this end, the Act provides:

> (a) "Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.
>
> (b) The first installment of compensation shall become due on the fourteenth day after the employer has knowledge of the injury or death . . . " 33 U.S.C. § 914.

The Act thus directs that compensation shall ordinarily

be paid to an injured employee without an award. The manifest purpose is to assure prompt aid to the employee when his need is greatest. See *American Stevedores, Inc. v. Porello*, 1946, 330 U.S. 446, 455—56, 67 S.Ct. 847, 91 L.Ed. 1011. To predicate the employer's right to sue for indemnity on payment under an award would tend to discourage the prompt and voluntary payment of compensation that the Act contemplates, since the employer would be compelled to controvert his obligation to pay compensation, to force an award and protect his right to pursue a remedy against third parties. Certainly we find no merit in the appellee's suggestion that by making statutory assignment contingent on payment of compensation under an award, Congress implied disfavor of voluntary payment and intended to deprive an employer who pays compensation voluntarily of his independent remedies against wrong-doing third parties.

This limitation on statutory assignment was imposed for a specific and limited purpose. Section 33, as originally enacted, provided that acceptance of compensation worked a complete assignment to the employer of all the employee's rights against third persons. Act of March 4, 1927, ch. 509, 44 Stat. 1424. This right was granted "in aid of the employer", not as a limitation on his right to nonstatutory recoupment. *The Etna*, 3 Cir. 1943, 138 F.2d 37, 40. But the effect of the assignment was to deprive the employee of any right to sue on his own behalf. His claim was thereby entrusted to his employer, who was entitled to file suit, or to compromise the claim, but whose interest in pursuing it, was not always sufficient to make him a satisfactory representative of his employee's interests. In 1938, the Act was amended to make payment of compensation under an award a pre-

requisite to statutory assignment, with "the apparent purpose . . . to provide payments during the period while the employee is unable to earn, when they are solely needed, without compelling him to give up his right to sue a third party when he is least fit to make a judgement of election." *American Stevedores, Inc. v. Porello*, 1946, 330 U.S. 446, 456, 67 S.Ct. 847, 852, 91 L.Ed. 1011. Act of June 25, 1938, ch. 685, § 12, 52 Stat.

The thrust of the amendment was thus to protect the employee against premature and unwitting surrender to his employer of his right to sue on his own behalf. See H.R.Rep.No.1945, 75th Cong., 3d Sess. 9 (1938); S.Rep.No.1988, 75th Cong., 3d Sess. 9 (1938). It attempted to do so by preserving the employee's right to sue on his claim. But there is nothing to suggest that the amendment was intended to divest the employer of his right to sue on his own behalf for recoupment from the party at fault. Nothing in that right is prejudicial to the right of the employee to pursue his own remedy. The employer's suit or settlement would in no way bind the employee or prevent him from enforcing his own rights.

In short, we find nothing in the statutory scheme or its legislative history that requires leaving the employer who voluntarily pays compensation without a remedy against culpable third parties. On the contrary. we conclude that such a holding would frustate the congressional objectives of providing prompt compensation to injured employees and of placing the ultimate burden of loss on the party at fault. We therefore hold that in the circumstances this case presents the employer who pays compensation without an award is not barred by Section 33 from pursuing whatever nonstatutory rights he may have against third party wrongdoers.

II.

We must also disagree with the district court's apparent conclusion that Argonaut had no right of action for recoupment sufficient to interrupt prescription of Louviere's claim, even in the absence of a statutory bar to assertion of nonstatutory remedies. We conclude that the employer, or as here, his subrogated insurer, is entitled to indemnity from a wrong doing third party.

Louisiana law is determinative of this question of nonstatutory recoupment. That law, no less than the common law, is fundamentally hostile to unjust enrichment. See, e. g., La.Civ.Code Art. 1965 (1870). Louisiana courts have, accordingly, long recognized an action for indemnity, although its social basis has been a source of some dispute.[6] Indeed, the courts have recognized an independent nonstatutory right of an employer paying workmen's compensation benefits to recoup those payments from a wrongdoing third party. See, e.g., *London Guarantee Accident Insurance Co. v. Vicksburg*, S. & *P. R. Co.*, 1923, 153 La. 287, 95 So. 771; *Foster and Glassell Co. v. Knight Brothers, Inc.*, 1922, 152 La. 596, 93 So. 913. Although these cases have been disavowed as inconsistent with the statutory scheme of the Louisiana Workmen's Compensation Act, the validity of the principle they embody is not challenged. *See Minyard v. Curtis*

[6]A number of different theories have, over the years, been advanced by the Louisiana Supreme Court to support an action for indemnity in circumstances similar to those present in this case—among them direct action in tort under Article 2315, quasi-contract, and legal subrogation. *See, for example*, Appalachian Corporation v. Brooklyn Cooperage Co., 1922, 151 La. 41, 91 So. 539; Foster & Glassell Co. v. Knight Bros., 1922, 152 La. 596, 93 So. 913; London Guarantee Accident Insurance Co. v. Vicksburg, S. & P. R. Co., 1923, 153 La. 287, 95 So. 771; Marquette Casualty Co. v. Brown, 1958, 235 La. 245, 103 So.2d 269. *See generally*, Minyard v. Curtis Products, Inc., 1967, 251 La. 624, 205 So.2d 422. *But see*, Forcum-James Co. v. Duke Transportation Co., 1957, 231 La. 953, 92 So.2d 228.

Products, Inc., 1967, 251 La. 624, n. 2, 205 So.2d 422, 430, n. 2.[7] More recently, in a suit for indemnity by a subcontractor against the manufacturer of defective materials, the Louisiana Supreme Court reconsidered the theoretical basis of the action in indemnity. *Minyard v. Curtis Products, Inc.*, 1967, 251 La. 624, 205 So.2d 422. Surveying recent decisions, the Court concluded that the principles proscribing unjust enrichment "were the underlying reasons for the decision of those cases which have allowed recovery under the concept of indemnity" and that later cases have "more properly characterized the action for indemnity as an action or claim in quasi contract for unjust enrichment." 205 So.2d at 431. "Under this general theory of quasi contractual obligation founded upon an unjust enrichment", the Court cited the "corrective or supplementary" civil law remedy of the action *de in rem verso* as the proper theory of recovery. The elements of this action, as elaborated by the courts in France, and applied in *Minyard* are: (1) there must be an enrichment, (2) there must be an impoverishment, (3) there must be a connection between the enrichment and resulting impoverishment, (4) there must be an absence of "justification" or "cause" for the enrichment and impoverishment and finally (5) there must be no other remedy at law. 205 So.2d at 432. See Nicholas, Unjustified Enrichment in Civil Law Part I, 36 Tul.L.Rev. 605, 610 (1962).

[7]Some of these decisions have come upon hard times as of late. *London Guarantee* has been overruled to the extent that it permits an unsubrogated insurer to sue for what is in effect "damage sustained by reason of a contractual obligation." Forcum-James Co. v. Duke Transportation Co., *supra*, 231 La. at 962, n. 3, 93 So.2d at 231, n. 3. The authority of *London Guarantee*, as well as of *Foster & Glasswell* was further undermined in Marquette Casualty Company v. Brown, 1958, 235 La. 245, 103 So.2d 269, to the extent that they suggested that a nonstatutory right to recoupment survived the enactment of the parallel statutory right of action. 235 La. 245, n. 3, 103 So.2d at 272, n. 3. Nevertheless, the reasoning of these cases may survive to the extent that it does not run afoul of a specific statutory scheme. *See* Minyard v. Curtis Products, Inc., 1967, 251 La. 624, n. 2, 205 So.2d 422, 430, n. 2.

Argonaut's complaint, we conclude, alleged facts sufficient to support relief under this theory; alleging specifically that the fault of the defendants injured the employee whom the plaintiff then became obligated to, and did in fact, compensate. Thus the alleged tortfeasors were enriched at the expense of the employer's subrogated insurer, without legal justification.

III.

The remaining question is whether the suit filed by Argonaut interrupts prescription of the employee's right of action against the same defendants. We are compelled, by decisions of the Louisiana Supreme Court, to hold that it does. Most directly pertinent is the decision in *National Surety Corp. v. Standard Accident Insurance Co.*, 1965, 247 La. 905, 175 So.2d 263.

There the employer's subrogated insurer had paid benefits to an injured employee pursuant to the Louisiana Workmen's Compensation Act and had subsequently filed a suit against an alleged third party tortfeasor seeking recovery of the amount paid.[8] More than one year after the accident, the employee intervened in the action, seeking damages, and the defendant pleaded prescription. The court held that the prescription running in favor of the tortfeasor was interrupted as to the injured employee by the timely filing of suit by the employer's compensation carrier. The employee's claim, the court concluded, was on the same cause of action, for purposes of LSA—R.S. 9:5801, as the employer's carrier

[8]The employer is guaranteed the right to sue on his own behalf by the statute. LSA—R.S. 23:1101. He does not, however, sue as a subrogee whose rights are derivative of those of his employee. The statute is held to grant him an independent right of action against wrongdoing third parties. Marquette Casualty Co. v. Brown, 1958, 235 La. 245, 103 So. 2d 269; Board of Commissioners of Port of New Orleans v. City of New Orleans, 1953, 223 La. 199, 65 So.2d 313.

suit. "Cause of Action", for those purposes, was defined as "an act on the part of a defendant which gives rise to a plaintiff's cause of complaint". 175 So.2d at 266. This analysis, the court held, was unaffected by the fact that the employee's claim had not been included in the original suit and substantially increased the aggregate demand against the defendant. Increased demand, the court noted, does not betoken a new cause of action. The court emphasized that, although the employee had been neither present nor represented in the original action, "*all prescriptions* affecting the cause of action sued upon are interrupted as to all defendants by the commencement of a civil action in a court of competent jurisdiction." 175 So.2d at 268.

The Louisiana Supreme Court, in a recent decision, has reaffirmed the reasoning and result of *National Surety* and overruled a court of appeals decision that attempted to narrow its implications. *Nini v. Sanford Brothers, Inc.*, La.1973, 276 So.2d 262, overruling *American Surety Insurance Co. v. Insurance Company of North America*, La.App.1969, 220 So.2d 163. The state court of appeals had held that a suit by one insured against another for the deductible portion of its losses did not interrupt prescription to permit a subsequent suit by the plaintiff's subrogated insurer against the defendant's insurer for amounts expended under its policy. *National Surety*, the court concluded, could not be read as extending the effect of interruption in favor of "*all* potential plaintiffs." 220 So.2d at 165. Furthemore, the court reasoned, *National Surety* was distinguishable as the plaintiff there had filed a timely intervention pursuant to specific provisions of the Louisiana Workmen's Compensation statute.

The Supreme Court in *Nini* found this reasoning in-

consistent with *National Surety*. 276 So.2d at 266, n. 6. It underscored *National Surety's* emphasis of the rule that "'*all* prescription affecting the cause of action therein sued upon are interrupted as a *all defendants*". 276 So.2d at 266. And it cited *National Surety* for the broad proposition that the effect of interruption of prescription was to be determined by the effect of the original petition in giving notice to the defendant of a claim arising out of the same cause of action, *viz.* the same set of operative facts. In broad language, the Court observed that "'the essence of interruption of prescription by suit has been notice to the defendant of legal proceedings based on the claim involved" so that prescription is interrupted "[w]hen the defendant knows or should know, prior to the expiration of the prescriptive period, that legal demands are made upon him from the occurence described in the petition filed". 276 So.2d at 264—65.

In another context we might be loathe to take the broad language of these opinions of the Louisiana Supreme Court at face value.[9] But the analogy of Louisiana Workmen's Compensation Law to the Longshoremen's and Harbor Workers' Compensation Act persuades

[9]A persuasive argument might be made that the holding of *National Surety* should not be extended beyond the special statutory context in which it arose. There was a line of authority to the effect that "[f]rom a single tortious injury to an employee there arises but one cause of action . . . and all damages flowing therefrom, which may include several different and distinct elements, are recoverable in one and the same suit." Board of Commissioners v. City of New Orleans, 1953, 223 La. 199, 65 So.2d 313, 314—16; Marquette Casualty Co. v. Brown, 1958, 235 La. 245, 103 So.2d 269. Indeed, the Court in *National Surety* placed substantial reliance on these cases, while inserting language with broader implications. The narrower view would, it appears, be most consistent with traditional jurisprudence, holding that prescription is interrupted only as to those persons who are parties or privies to the original action. See, e. g., Geisenberger v. Cotton. 1906, 116 La. 651, 40 So. 929; Becnel v. Waguespack, 1888, 40 La.Ann. 109, 3 So. 536; Flower v. O'Connor, 1841, 17 La. 213; Blanc v. Dupre, 36 La. Ann. 847. Under this view, the general test of interruption of prescription by filing of suit has been not only notice to the defendant of the plaintiff's claim but also of *his intention to assert it See* Comment, 9 Tul.L.Rev. 285, 286.

Nevertheless, the Court in *Nini* has, to all appearances, rejected this

us that *National Surety* and *Nini* should control the disposition of this appeal. We conclude, accordingly, that suit by the employer's subrogated insurer to recover benefits paid an injured employee unde rthe Longshoremen's and Harbor Workers' Compensation Act will interrupt prescription to permit a subsequent suit by the employee for damages arising out of the same occurrence. The employer-employee nexus under the Act assures that suit by the employer, or by his subrogated insurer, will necessarily include allegations of injury to its employee, and thereby give clear notice to the defendants of the potential claim of that employee.

We therefore hold that Argonaut's suit was effective to interrupt prescription of Louviere's claim. In so holding, we imply no opinion as to the merits of Louviere's claim or, for that matter, the claim of Argonaut. We reverse the judgement of the district court and remand this case for further proceedings consistent with this opinion.

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narrower view. There *National Surety* was not treated as a narrow exception carved out of the general rule but as illustrative of the general rule itself. It is notice not of the plaintiff's intention to assert his demand, but of any demand stemming from the same tortious occurrence or conduct, which interrupts prescription as to subsequent demands on that "cause of action," at least to the extent that the first demand sufficiently implies the second. Thus, the narrower view, of *National Surety*, whatever its intrinsic merit, is not the current view of the Louisiana Supreme Court.

Clerk of Court
Fifth Circuit Court of Appeal
600 Camp Street
New Orleans ,Louisiana 70130

April 4, 1975

RE: No. 73-3686
Raymond D. Louviere
et al. v. Shell Oil Co.
Our File: B 12004 D

Dear Sir:

In accordance with telephone conversation with your office, I am writing this letter to ask that in connection with Petition for Rehearing, Petition for Rehearing En Banc filed by American Marine Corporation, and on behalf of Movible Offshore, Inc., Pacific Indemnity Company, Teledyne Movible Offshore, Teledyne, Inc., Texsteam Corporation, Therm-O-Disc, Inc., E. L. Weigand Company, Insurance Company of North America, Pneumatic Service & Equipment Company, Avondale Shipyards, Inc., and Shell Oil Company, we desire to go on record as adopting in its entirety the Petition for Rehearing, Petition for Rehearing En Banc, and Arguments set forth in its Brief, filed by and on behalf of American Marine Corporation.

I would appreciate your filing this letter as evidence of the aforesaid parties' joining in and adopting the Petition for Rehearing filed.

Very truly yours,
W. K. Christovich

WKC/va

cc: Mr. W. D. Atkins, Jr.
Mr. Donald A. Hoffman
Mr. Felicien P. Lozes
Mr. Francis G. Weller
Mr. James E. Diaz
Mr. Charles D. Marshall, Jr
Mr. W. Eugene Davis
Mr. Alfred S. Landry
Mr. John O. Charrier, Jr.
Mr. Joel L. Borello

May 27, 1975

Clerk, U. S. Court of Appeals
Fifth Circuit
600 Camp Street
New Orleans, Louisiana 70130

Attention: Mr. Richard Windhorst

Re: Raymond D. Louviere, et al. vs.
Shell Oil Company, et al.
No. 73-3686

Gentlemen:

I understand that in early April, Attorney William K. Christovich wrote to your office indicating that the various appellees, including my clients, Pneumatic Service and Equipment Company and Insurance Company of North America, wish to join in the Petition for Rehearing *en banc* filed by counsel for American Marine Corporation. I did not receive a copy of this correspondence with the court apparently because I was in the process of changing law firms at that time. Subsequently, I have been out of the City attending the Paris adjunct of the Louisiana State Bar Association convention in Europe.

At this time, I am writing to the Court to indicate that Mr. Christovich's request of April 4, 1975, has the approval of my clients, and that they wish to join in the Petition for Rehearing and to adopt the Brief in support thereof which has been filed by Appellee, American Marine Corporation.

We would ask that all future communications pertaining to this case be directed to our office, and we have

enclosed a Motion to Substitute Counsel of Record in the captioned matter.

Thank you for your cooperation in this matter.

Very truly yours,

Donald A. Hoffman

DAH:np
Enclosure

cc: Mr. W. D. Atkins

cc: Mr. William Christovich

cc: Mr. John Charrier

cc: Mr. Frank Weller

cc: Mr. W. Eugene Davis

cc: Mr. Charles D. Marshall, Jr.

bps: To all counsel:

I have checked with Mr. Richard Windhorst in the Clerk's Office, Fifth Circuit, U. S. Court of Appeals, and have been advised that our joining in the Petition for Rehearing by adopting the Brief of American Marine Corporation will serve to toll the 90-day period in which to file a Pettion for Certiorari to the U. S. Supreme Court. Therefore, it will not be necessary for us to file an application for extension of time in which to file the Petition for Certiorari. We will have an additional 90 days from the date of the denial of the Petition for Rehearing *en banc.*

Donald A. Hoffman

Mr. Donald A. Hoffman
Attorney at Law
1800 NBC Building
New Orleans, Louisiana 70112

May 29, 1975

No. 73-3686—Louviere, et al. v. Shell Oil Co., et al.

Dear Sir:

Receipt is acknowledged of your letter of May 27, 1975.

On April 7, 1975, this office received a letter from Mr. W. K. Christovich dated April 4, 1975 on behalf of Movible Offshore, Inc., et al. including Pneumatic Service and Equpiment Company and Insurance Company of North America, joining in its entirety the petition for rehearing and petition for rehearing En Banc filed by American Marine Corporation.

Also, the motion to substitute counsel of record has been granted. Your appearance has been entered as lead counsel of record for appellees, Pneumatic Service and Equipment Company and Insurance Company of North America. You will receive copies of all further orders, notices, etc. that may be entered in this appeal.

Very truly yours,
EDWARD W. WADSWORTH,
Clerk

By_____
Richard E. Windhorst, Jr., Chief
Judicial Support Division

REW, JR:lgg

cc: Mr. W. D. Atkins, Jr.
Mr. W. K. Christovich
Mr. John O. Charrier, Jr.
Mr. Francis G. Weller
Mr. W. Eugene Davis

United States Court of Appeals,
Fifth Circuit

No. 73-3686.

July 3, 1975.

Raymond D. LOUVIERE et al.,
Plaintiff-Appellants,

v.

SHELL OIL COMPANY et al.,
Defendants-Appellees.

Appeal from the United States District Court fo rthe Eastern District of Louisiana.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion March 6, 1975, 5 Cir., 1975, 509 F.2d 278)

Before WISDOM and BELL, Circuit Judges, and BREWSTER, District Judge.

PER CURIAM:

American Marine Corporation, an appellee, has raised in its petition for rehearing a number of contentions which we have considered and found unpersuasive. It argues first that the Supreme Court's holding in *Doleman v. Levine*, 295 U.S. 221, 55 S.Ct. 741, 79 L.Ed. 1402 bars an employer who is not a statutory assignee from maintaining an action in indemnity against a wrongdoing

third party. This argument was considered and rejected in *Burnside. Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 1969, 394 U.S. 404, 413, n. 13, 89 S.Ct. 1144, 1149, 22 L.Ed.2d 371, 379. Another contention raised is that this Court erred in adopting Louisiana law as surrogate federal law. The Outer Continental Shelf Lands Act provides, however:

> To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws . . . the civil and criminal laws of each adjacent State . . . are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon . . . "

43 U.S.C. § 1333(a)(2). These structures are thus "to be treated as islands or as federal enclaves within a landlocked State . . . " *Rodrigue v. Aetna Casualty & Surety Co.*, 1969, 395 U.S. 352, 361, 89 S.Ct. 1835, 1840, 23 L.Ed.2d 360, 367. "Congress specifically rejected national uniformity and specifically provided for the application of state remedies . . ." *Chevron Oil Co. v. Huson*, 1971, 404 U.S. 97, 104, 92 S.Ct. 349, 354, 30 L.Ed2d 296, 304. As we stated in our earlier opinion, adoption of the Louisiana law of indemnity does not conflict, but rather furthers the policies underlying the Longshoremen's and Harbor Workers' Compensation Act. *Louviere v. Shell Oil Co.*, 5 Cir. 1975, 509 F.2d 278, 282—84. We have not been persuaded to reconsider that conclusion. Nor have we been persuaded that we erred in adopting the Louisiana law of prescription. See generally, *Chevron Oil Co. v. Huson*, 1971, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296.

For the foregoing reasons, and because no member of

this panel nor judge in regular active service on the Court has requested that the Court be polled on rehearing en banc, the Petition for Rehearing and Rehearing En Banc is dened. See Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12.